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JOSEPH F. SPANIOLO, JR.
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No. 88-1993

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IN THE
Supreme Court of the United States

October Term, 1988

ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida, and

T. EDWARD AUSTIN, JR.,
as State Attorney to the Charlotte County, Florida,
Special Grand Jury,

Petitioners,

v.

MICHAEL SMITH,

Respondent.

**ON PETITION FOR CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

PETITIONERS' REPLY BRIEF

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**REPLY TO RESPONDENT'S ARGUMENT IN
OPPOSITION TO REASONS FOR GRANTING THE
WRIT**

Stripped of its gloss, Smith argues general First Amendment principles, urging their application to Florida's grand jury statute, as well as to the laws of 16 other states, despite the recognized interests as set out by both courts below in subjecting its grand jury system to the primacy of judicial control and supervision.

It is this recognition, coupled with the evisceration of Florida's ability to supervise state grand jury proceedings in a manner akin to federal courts under Rule 6(e), that serves as the basic and fatal flaw in Smith's argument.

This Court's precedent specifically recognizes the all-encompassing nature of grand jury investigations and the concomitant necessity for the retention of judicial oversight, even in the face of Rule 6(e). The Eleventh Circuit's elimination of the power of Florida's judiciary to prevent a grand jury witness from disclosing the nature of his testimony once a particular investigation is completed, stands in stark contrast to this Court's analysis in *Douglas Oil Company v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979), wherein the Court concluded in part that such disclosure could have an effect upon the functioning of future grand juries, in that persons called upon to testify will be influenced by the likelihood that their testimony may one day be disclosed to outside parties.

The Eleventh Circuit further glosses over the need for a judge to determine the sensitivity of testimony that could present a clear and present danger of harm to the public should it be disclosed. Yet, under the Eleventh Circuit's opinion, Florida's judiciary is barred from overseeing and preventing such a situation.

A basic flaw in the Eleventh Circuit's opinion is its failure to deal with these issues which are peculiarly within the domain of the judicial branch of government.

In attempting to bring his anticipated disclosures within the coverage of the First Amendment, Smith contends that the public is deprived of the information he wishes to disclose; however, nowhere in the record does Smith indicate what it is he wishes to disclose. The only information in the record is that he has an economic purpose; that is, to publish a book or article. How Smith's disclosure is to advance open and robust public debate remains a matter outside the record in this cause.

On balance, the extreme impact upon the state's grand jury system requires the issuance of the writ by this court and the reversal of the decision of the Eleventh Circuit Court of Appeals in favor of the primacy of judicial supervision of Florida's grand jury proceedings.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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